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No. 84-256

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROY L. WILLIAMS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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The Solicitor General's lengthy Brief in Opposition supports our view that the legal grounds relied on by the courts below depart significantly from established principles of constitutional and statutory law. Important protections afforded by Congress in the Omnibus Crime Control and Safe Streets Act of 1968 to render electronic eavesdropping constitutional have simply been ignored in the judgment affirming petitioner's conviction. And the affirmance of petitioner's conviction rests on a legal con-

clusion regarding the admissibility of hearsay declarations that conflicts with the decisions of four courts of appeals.

1. The Solicitor General concedes that the seizure of 33 conversations recorded by the FBI agents months before they had any suspicion that there was a bribery conspiracy was not based on a determination that "there was probable cause, at the time of the interception, to believe that the conversations were incriminating" (Br. in Opp. 10). The Solicitor General argues only that "the practicalities of electronic surveillance" made it "reasonable and necessary" to permit the agents to record conversations that were unrelated to the lawful objects of the search as defined in the judicial warrant (*id.*).

The Solicitor General thereby obliterates the difference between the transitory intrusion of a search — during which "practicalities" may justify officers' examination of items that are not squarely within the described bounds of a warrant — and a seizure — which must rest on probable cause justifying the government's extended exercise of custody and control over private property. We acknowledge — and have never disputed — that while agents are conducting an electronic surveillance, they may overhear conversations that do not initially appear to be squarely within the four corners of the warrant. With regard to this "search" aspect of electronic surveillance, the "minimization" requirement of Title III of the Safe Streets Act is the appropriate limitation.

Different statutory and constitutional principles apply, however, to the agents' *permanent* recording — *i.e.*, to their "seizure" — of conversations they have overheard. The statutory "minimization" obligation is irrelevant to the authority to "seize" — *i.e.*, to the agents' power to

record intercepted conversations for use months or years later. Indeed, this Court's opinion in *Scott v. United States,* 436 U.S. 128 (1978), on which the Solicitor General places heavy reliance (Br. in Opp. 8, 10-11), noted that the intercepted conversations in that case could not accurately be classified "prior to their termination" (436 U.S. at 140) or "until completion of these calls" (436 U.S. at 142). When the conversation is completed – or shortly thereafter – the nature of the conversation may be determined and a decision made whether it has to be "seized." It was never suggested in *Scott* or in any other decision of this Court that long after "termination" or "completion" of the calls they may be retained – or "seized" – for examination and use in light of discoveries and events that occur months later.

To our knowledge, this is the first case in which a court has held that any conversation that an agent may lawfully overhear and record temporarily (so that it not be lost if, at the conclusion of the conversation, it may be lawfully "seized") is, *ipso facto,* subject to total seizure and permanent retention.[1]

If the decision below is permitted to stand, the constitutional requirement that a warrant "particularly describe the . . . things to be seized" has become a dead letter in the area of electronic surveillance. By the same token, subsection 4(c) of 18 U.S.C. § 2518, which prescribes that an

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[1]We noted in our Petition (p. 11) that Justice Harlan had distinguished in *Berger* v. *New York,* 388 U.S. 41, 98-99 (1967), between "search" and "seizure" of conversations subject to electronic surveillance. The Solicitor General totally ignores this distinction and fails to deal with Justice Harlan's observation.

order authorizing an electronic surveillance must include "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates," is effectively written out of the law. Regardless of the specific description in the judicial order, the overhearing agents may, under the Solicitor General's rationale, "seize" – *i.e.*, record for posterity – any communication to which they are legally entitled to listen under the very limited temporary authorization discussed in *Scott*.

The Fourth Amendment's search-and-seizure provisions do not authorize similar permanent invasions of privacy and deprivations of property rights in any other search. When a warrant for physical evidence is executed, only the things described in the warrant, or contraband and incriminating evidence "in plain view," may be seized by the officers engaged in the search. If the officers go beyond those limitations, the seized evidence must be suppressed and returned. In its opinion in *Andresen v. Maryland*, 427 U.S. 463, 482 n. 11 (1976), this Court warned that such a rule must be rigorously applied to "the 'seizure' of telephone conversations."

The decision of the court below conflicted, on this point, with decisions of the Fifth and Third Circuits in *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981), and *United States v. Christine*, 687 F.2d 749 (3d Cir. 1982). Both courts have held that if seized physical or documentary evidence is found to be beyond the authorization of a valid search warrant, it must be suppressed. *See also United States v. Christine*, 563 F. Supp. 62 (D.N.J. 1983); *United States v. Perez*, 562 F. Supp. 574 (D.N.J. 1982) (suppressing seized evidence beyond scope of valid warrant).

The decision of the Seventh Circuit in this case also conflicts with the recent ruling of the New York Court of Appeals in *People v. Basilicato,* decided December 20, 1984, 36 Crim. L. Rep. 2267. During the execution of a judicially authorized telephone wiretap, officers overheard two conversations which were not conducted on the telephone but which were overheard when the telephone was off the hook. The New York Court of Appeals held that the Fourth Amendment and *Berger v. New York, supra,* authorized the "seizure" of only what the warrant described — *i.e.,* telephonic conversations. Any other conversations "seized" during the warrant's execution had to be suppressed. The court also held that the seized conversations could be admitted only if they were otherwise in "plain view," and it concluded that the "plain view" doctrine did not apply on the facts of the surveillance at issue. The same reasoning would necessarily result in the suppression of the 33 conversations overheard and seized in this case.

2. The Solicitor General argues that "a full account" of the results of the wiretap was given in the FBI agent's first application for an extension of the wiretap surveillance and that the statute authorizes either "such an account *or* an explanation of the failure to obtain results" (Br. in Opp. 11). In fact, the statute does not refer to an "account," but only to a statement of "the results thus far obtained." The word "results" must mean affirmative fruits of the surveillance. The statutory requirement is not met by an enumeration of irrelevant conversations establishing that the wiretap has been fruitless. Indeed, it is precisely when there are no "results" that an explanation is needed.

Nor is there any validity whatever to the Solicitor General's assertion that the FBI agent's representation that Dorfman had been absent from Chicago for a month was

an explanation of the "failure to obtain results" (Br. in Opp. 11-12). As the court of appeals observed, the applying FBI agent made this assertion not to explain his failure to obtain results but as part of a false representation that the wiretap had borne its expected fruit (Pet. App. 9a).

Finally, this Court's decision in *United States v. Giordano,* 416 U.S. 505 (1974), when read in light of Justice Powell's dissent, confiicts squarely with the decision of the court of appeals in this case. The majority held in *Giordano* that if the results of an initial surveillance had been omitted from an extension application, "no extension order at all could have been granted." 416 U.S. at 532. That is precisely what happened in this case. The precondition prescribed by Section 2518(1)(f) was not fulfilled, and the extension was, therefore, invalid. The fact that the extension in *Giordano* had been based on an invalid initial order that *had* produced results surely made *Giordano* no stronger than this case, in which a valid initial order produced no results and no explanation was given of the failure to produce results.

3. Co-defendant Lombardo has, in a separate petition (No. 84-585), challenged the district court's application of the First Amendment's defamation test to the doctrine of *Franks v. Delaware,* 438 U.S. 154 (1978). We adopt that argument, as well as the other arguments made in Lombardo's petition.

The Solicitor General now seeks to avoid the necessary consequence of the lower court's utilization of the First Amendment test – *i.e.,* the application of the rule of appellate review announced in *Bose Corp. v. Consumers Union, Inc.,* 104 S.Ct. 1949 (1984) – by claiming that the district court's conclusion was amply justified (Br. in Opp.

16). In the court of appeals, however, we vigorously challenged the district court's finding, and we believe the finding was wrong even under the "clearly erroneous" standard. *See* Brief for Appellant Williams, 7th Cir., pp. 77-78 & n. 19. The court of appeals invoked the "clearly erroneous" standard because that standard enabled it to avoid a very difficult factual determination. If the court of appeals is directed to apply the *Bose* standard, which is the measure that should govern constitutional claims in which "reckless disregard" is a critical factual issue, it will, we believe, overturn the district court's finding. At the very least, petitioner should be permitted to argue his position to the court of appeals under the correct standard.

4. There is an acknowledged conflict among the courts of appeals over the viability of the co-conspirators' hearsay exception in view of *Ohio v. Roberts,* 448 U.S. 56 (1980) (Br. in Opp. 17-18). The Solicitor General counts five Circuits as opposed to our position, but enumerates four Circuits — including highly respected courts such as the Second and Third Circuits — as "adopt[ing] the rule petitioners urge" (Br. in Opp. 18). Since the legal question is highly important to criminal prosecutions and since there has been substantial uncertainty over it in Circuits where major criminal prosecutions continue to be brought, the issue should be authoritatively resolved by this Court.

There is, finally, no substance — insofar as petitioner Williams is concerned — to the assertion that the hearsay declarations admitted against him had "indicia of reliability." Dorfman's most incriminating statements regarding petitioner Williams were *not* made in Williams' presence or in the presence of anyone else who had reason to know what Williams had said or done. Dorfman had every per-

sonal reason to falsify and exaggerate Williams' involvement during conversations in Williams' absence. And, contrary to the Solicitor General's representation, the most incriminating conversations occurred after the events in question and they consisted of recitations by others as to what Mr. Williams had done. Consequently, a scrupulous evaluation of the reliability of the declarations would render them inadmissible against Mr. Williams.

CONCLUSION

For the foregoing reasons, and those set forth in our petition, the writ of certiorari should be granted.

Respectfully submitted,

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